No. 84-751

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

LONNIE LEWIS,
Petitioner,

v.

JOSEPH MAGNIN CO., INC., et al.,
Respondents.

Brief Of Respondents Joseph Magnin Co., Inc. and New Magnin, Inc. In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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December 21, 1984

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SPECIAL NOTE

In this suit, Respondents Joseph Magnin Company, Inc., and New Magnin, Inc., are being sued as debtors.[1/] On September 16, 1984, Joseph Magnin Co., Inc. filed a petition under Chapter XI of the Bankruptcy Code, Case No. 3-84-01756 LK. As the Court is aware, the filing of a Chapter XI proceeding acts as an automatic stay of any litigation against the debtor. See 11 U.S.C. § 362(a). Hence, the initiation of that bankruptcy proceeding caused the stay of this action as to Respondents, Joseph Magnin Company, Inc. and New Magnin, Inc. (hereinafter collectively referred to as "Magnin"). In any event, inasmuch as Magnin believes that

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1/ On December 29, 1983, New Magnin, Inc. merged with Joseph Magnin Co., Inc. Joseph Magnin Co., Inc. is a wholly owned subsidiary of the Acquihold Corporation.

this case is not a proper one for granting a writ of certiorari, it opposes the writ for the reasons discussed herein.

QUESTIONS PRESENTED

1. Where an employee has been terminated by his employer due to the loss of a particular customer's business and the unavailability of substitute work, may the employee obtain judicial review of his claim that the collective bargaining agreement was thereby breached if his union does not join the nonsignatory former customer in a grievance proceeding against the employer?

2. A. Is the decision of the Court of Appeals for the Ninth Circuit consistent with this Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967), in its determination that the Union breached no duty of fair representation where it failed to grieve against the Employer's former customer, which was not a signatory to any

collective bargaining agreement and which had never agreed to be bound by any collective bargaining agreement?

B. Is the decision of the Court of Appeals consistent with this Court's decision in Vaca v. Sipes, 386 U.S. at 185, in its determination that an action for breach of a collective bargaining agreement cannot be brought against an employer's former customer, which was not a signatory to a collective bargaining agreement and had never agreed to be bound by any such agreement, because the former customer could not be found to have "repudiated" a grievance procedure in which it was never even asked to participate?

3. If the Employer's former customer was found to have engaged in "deception" concerning its status as a co-employer of a discharged employee, should the decision in Vaca v. Sipes, supra, be

reconsidered, insofar as it precludes the discharged employee from obtaining judicial review of his claim that the customer's conduct violated the collective bargaining agreement?

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LONNIE LEWIS, Petitioner,

v.

JOSEPH MAGNIN CO., INC.,
et al., Respondents.

BRIEF OF RESPONDENTS
JOSEPH MAGNIN CO., INC. AND
NEW MAGNIN, INC. IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

Respondents, Joseph Magnin Co., Inc. and New Magnin, Inc. ("Magnin") respectfully pray that this Court deny Petitioner Lonnie Lewis' ("Lewis") Petition for a Writ of Certiorari and that it affirm the

opinion and judgment issued by the United States Court of Appeals for the Ninth Circuit on June 28, 1984.

OPINION BELOW

The opinion of the Court of Appeals and the orders of the Trial Court are appended to Lewis' Petition. The Court of Appeals, in an unreported decision, affirmed the Trial Court's Orders granting directed verdicts on behalf of all Respondents.

JURISDICTION

Lewis properly invokes the Court's jurisdiction in its Petition for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Lewis identifies the relevant statutory provision, 29 U.S.C. § 185(a), in his Petition.

STATEMENT OF THE CASE

During all times relevant to these proceedings, Lewis was a truckdriver and

member of the Respondent labor union ("Local 85"). Between December 1971 and October 1979, he was employed by various trucking companies, each of which had been engaged by Magnin to provide labor for the transportation of Magnin's inventory between its facilities in Los Angeles and San Francisco. Each of the various trucking companies was a signatory to a collective bargaining agreement with Local 85. At no time, however, was Magnin a signatory to a collective bargaining agreement with Local 85 or any other collective bargaining agreement covering the drivers.

As relevant herein, Lewis was employed by Respondent Eckdahl Warehouse Co. ("Eckdahl") between 1977 and 1979. Like the other driver supply companies previously used by Magnin, Eckdahl was a party to a collective bargaining agreement with Local 85. In October 1979, Magnin decided

for economic reasons to terminate its relationship with Eckdahl and substitute another carrier, Lease Transportation. Since Eckdahl had no other work for Lewis, it laid him off.

While Lewis was on Eckdahl's payroll, Magnin treated him as an Eckdahl employee and not one of its own. The "Driver Service Agreement" between Eckdahl and Magnin, which as relevant covered Lewis' employment between 1977 and 1979, expressly provided that Eckdahl would employ drivers and make their services available to Magnin and that Eckdahl would pay the drivers' wages, fringe benefits, insurance, and taxes. It is undisputed that Eckdahl paid Lewis and bore the other expenses it was required to pay under the Driver Service Agreement.

The Driver Service Agreement also provided that the "employment of said drivers will be consistent with any

applicable collective bargaining agreement." As previously noted, of the two signatories to the Driver Service Agreement, only Eckdahl was a party to a collective bargaining agreement covering the drivers. Magnin was never a party to any collective bargaining agreement covering the drivers. Additionally, the Driver Service Agreement provided that, upon notice, the Agreement could be terminated by "[e]ither party at any time."

After Lewis was laid off by Eckdahl upon its loss of Magnin's business, Local 85, on Lewis' behalf, filed a grievance with the California Bay Area Labor Management Committee ("Bay Area Committee") in accordance with the governing collective bargaining agreement. Since Magnin was never a party to the collective bargaining agreement, the grievance was filed only against Eckdahl.

Magnin was never asked to participate in the grievance.

The grievance was based on a claimed violation of a section of the National Motor Freight Agreement covering "Changes of Operation." That section required approval to be obtained from a "Change Of Operations Committee" before initiating changes in any existing employer operations if such changes would have an adverse impact upon union labor. At the grievance hearing Local 85's representatives argued that Magnin and Eckdahl were Lewis' joint or co-employers, and that as such each was bound to follow the terms of the collective bargaining agreement prior to changing its operations where the change would adversely affect union labor.

Ultimately, Lewis' grievance was denied by the Joint Western Area Committee after an appeal from a deadlocked Bay Area Committee. The Joint Western Area

Committee's basis for its denial was not disclosed.

In the lower courts, Lewis never disputed that Eckdahl lost Magnin's business and that it had no other work for him. He claimed, however, that Eckdahl and Magnin could not rely on the grievance proceeding as final, binding, and preclusive of litigation because Local 85 failed to grieve on Lewis' behalf against Magnin as a co-employer covered by the collective bargaining agreement and that it thereby breached its duty of fair representation to Lewis. Lewis argued that the Driver Service Agreement's requirement that the drivers' employment be "consistent with any applicable collective bargaining agreement" constituted Magnin's assent to be bound by the collective bargaining agreement rather than, as Eckdahl and Magnin <u>both</u> contended, a requirement that Eckdahl observe the terms of any

collective bargaining agreement to which it was a signatory while it furnished drivers to service Magnin's job requirements.

After six days of hearing in the Federal District Court for the Northern District of California, Local 85, Magnin, and Eckdahl each moved for directed verdicts. Judge Lloyd H. Burke, who had presided over the proceedings, granted the motions. As is relevant here, Judge Burke concluded that the evidence failed to establish:

(1) That Local 85 violated its duty of fair representation to Lewis;

(2) That Magnin and Eckdahl were either alter egos, single employers or joint employers such that Magnin was bound to the Eckdahl-Local 85 collective bargaining agreement;

(3) That Magnin was a party to or independently bound by a collective bargaining agreement with Local 85;

(4) That Magnin was prevented by either its Driver Service Agreement or any portion of a collective bargaining agreement from terminating its use of Eckdahl;

(5) That Eckdahl breached any provision of the collective bargaining agreement; and

(6) That Eckdahl laid off Lewis for any reason other than the loss of the Magnin work and the lack of alternative work.

Judge Burke also found that the Joint Western Area Committee's February 1980 decision on Lewis' grievance was final, binding and preclusive of this action.

Upon appeal, the Ninth Circuit found, in its unpublished opinion, that Local 85's agent who investigated Lewis' grievance "may have made errors in judgment by not

filing a grievance against Magnin" and by failing to obtain a copy of the [Driver Service] agreement between Eckdahl and Magnin." It further found that Local 85's presentation to the Joint Western Area Committee was "sketchy" and "casual." The Court concluded, however, that such "errors" were not "egregious," and did mot reflect "reckless disregard" for Lewis' rights sufficient to justify a conclusion that a duty of fair representation was breached (App. 5).

The Ninth Circuit also rejected Lewis' argument that Magnin cannot rely on the finality of a grievance decision because its decision amounted to a repudiation of the grievance process. The Court found that, since Lewis' grievance named only Eckdahl and since Magnin was never asked to participate, Magnin's absence did not constitute a repudiation

of the collective bargaining agreement remedies (App. 5-6).

In his Petition for a Writ of Certiorari, Lewis now seeks this Court's reweighing of the evidence which the Ninth Circuit found insufficient to establish either a breach of Local 85's duty of fair representation or a repudiation of the collective bargaining remedies by Magnin. Lewis also raises, for the first time, an argument that there should be a "deception" exception to the limitation on employee collective bargaining agreement litigation set forth in Vaca v. Sipes, 386 U.S. 171 (1967).

Magnin's responses to Lewis' contentions are set forth below.

SUMMARY OF ARGUMENT

For the most part, Magnin adopts the arguments set forth in Eckdahl's brief in opposition to Lewis' Petition for a Writ of Certiorari. As is developed therein,

in asking that the Court find that Local 85 breached its duty of fair representation toward him and specifically that the court should conclude that Local 85's conduct evidenced arbitrary, discriminatory and/or bad faith conduct rather than mere negligence, Lewis is simply asking the Court to reweigh the evidence. Notably, Lewis does not argue that the lower court applied the wrong legal standard, but only that it reached the "wrong" conclusion in making this finding. This contention is an insubstantial one for granting the writ.

Likewise, Magnin adopts the argument in Eckdahl's brief that this Court would have to reweigh undisputed evidence to conclude that Magnin did not "repudiate" the grievance process when it did not attend a grievance proceeding in which it was not even named as a Respondent and in which it was never even asked to

participate. As is pointed out in Eckdahl's brief, the Courts of Appeals and this Court should be courts of last resort for such factual determinations.

Magnin also adopts Eckdahl's argument with respect to Lewis' new issue, not raised in his appeal to the Ninth Circuit, that there is no public policy basis for a "deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements. The existing rule is sufficiently broad to afford relief against "deceptive" employers in any case where the relief is justified by the record. Further, even if the Court could find that a "deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements might be

found, this case plainly is an inappropriate vehicle for the Court to find such an exception since no evidence whatsoever was found that Magnin had deceived Plaintiff. Therefore, no basis has been presented for a changed rule or result in this case.

REASONS FOR DENYING THE WRIT

A. This Court Is Merely Being Asked To Substitute Its Weighing Of The Facts For That Of The Ninth Circuit.

Significantly, Lewis does not contend that the Ninth Circuit misapplied the rule of Vaca v. Sipes, 386 U.S. at 190, that a union does not breach its duty of fair representation unless its handling of a grievance was "arbitrary, discriminatory or in bad faith." Accord, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976). Rather, Lewis is simply asking the Court to reweigh the factual evidence to determine that Local 85's alleged "errors" did indeed amount to

"arbitrary, discriminatory or bad faith" conduct. It is well settled that this Court does not sit to redetermine or second-guess Courts of Appeals with reference to factual evidence. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951). Moreover, Lewis points to no facts to establish that Local 85 failed to act in "complete good faith" and with "an honesty of purpose" in pursuing his grievance. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

Lewis' failure to provide any reason, beyond his request that the Court reweigh the evidence, to establish that Local 85 handled his grievance in such a manner to constitute a breach of the duty of fair representation itself requires that his Petition for a Writ of Certiorari be denied. This is so since, as this Court held in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976):

> To prevail against either the company or the union, Petitioners must show not only that their discharge was contrary to the contract, but must also carry the burden of demonstrating breach of duty by the union.

Absent a showing that Local 85 breached its duty of fair representation toward him, Lewis has no cause of action based upon a claim that either Magnin or Eckdahl breached the collective bargaining agreement. Id. Hence, under settled law, Lewis' Petition for a Writ of Certiorari in this case must necessarily be denied.

B. Lewis' Contention That The Lower Court Erred By Finding That Magnin Did Not Repudiate The Grievance Procedure Likewise Asks The Court To Reweigh The Evidence.

Lewis argues in his Petition that the Ninth Circuit wrongly evaluated the evidence that Magnin "repudiated" the Eckdahl-Local 85 collective bargaining agreement's grievance procedures and that therefore he should be entitled to proceed

against Magnin. This argument should be rejected for any and all of the following reasons. First of all, Lewis nowhere claims that the Court of Appeals applied the wrong legal or public policy standards, but is simply asking the Court to reweigh the evidence. Even if the Court agreed to do this, the record provides no basis for a contrary finding since it is undisputed that Magnin was not a party to the Local 85 contract and was not asked to participate in Lewis' grievance. Hence, there is simply no way on this record Magnin could be found to have "repudiated" the contractual grievance procedure by failing to participate in Lewis' grievance.

Secondly, as pointed out in Eckdahl's brief (pages 15-16), it does not appear in any event that this issue was critical to the Court of Appeals' review of the District Court's directed verdicts, since

the Circuit Court did not disturb the lower court's findings that Magnin and Eckdahl were not Lewis' co-employers and that Magnin was not bound by the terms of the collective bargaining agreement. In all of these circumstances, Lewis' argument provides no basis for granting a writ.

In any event, Magnin is clearly entitled to rely on the finality of the grievance committee's decision denying Lewis' grievance not withstanding its non-participation in that procedure since Lewis has never asserted below that his claim against Magnin was a claim independent of Magnin's relationship with Eckdahl. Rather, Lewis has always argued that Magnin had a "co-employer" relationship with Eckdahl that mandated that Magnin be bound to the collective bargaining agreement. Since the only basis for Lewis' argument that Magnin was bound to comply

with the Local 85-Eckdahl contract is through its alleged "co-employer" relationship with Eckdahl, Magnin must be seen to have been in the same shoes as Eckdahl and to thus be wholly protected by the finality of the grievance committee's decision that Lewis' layoff did not violate the collective bargaining agreement.

C. Lewis Identifies No Valid Basis For Creating A New Exception To The Rule Of Vaca v. Sipes For "Employer Deception".

With reference to Lewis' newly-raised contention that there should be an exception to the rule of Vaca v. Sipes, where an employer has engaged in deception to conceal the fact of employment, Magnin adopts in full the argument set forth in Eckdahl's brief in opposition to the Writ for Certiorari (see pages 18-23).

Magnin further wishes to point out that even if the Court could find that a

"deception" exception to the Vaca v. Sipes limitation on employees' rights to sue their employers where there are exclusive and binding remedies in collective bargaining agreements could be found, this case is plainly an inappropriate vehicle for the Court to find such an exception since the evidence showed that Magnin had in no way deceived Lewis. Specifically, it is undisputed that Magnin was never a party to any collective bargaining agreement covering Lewis and that it never represented to Lewis or anyone else to the contrary. Further, Lewis does not contend that the lower courts had improperly concluded that Magnin was in any way bound to any collective bargaining agreement. Therefore, no basis has been presented for a changed rule or result.

CONCLUSION

For the reasons set forth in this Brief in opposition, as well as those set

forth in the Brief of Respondent Eckdahl, Magnin respectfully submits that Lewis' Petition for Writ of Certiorari should be denied and the opinion of the Ninth Circuit affirmed.

Respectfully submitted,

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December 21, 1984

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-first day of December, 1984, three copies of the Brief of Respondents Joseph Magnin Co., Inc. and New Magnin, Inc. were mailed, postage prepaid, to counsel for each party, addressed as follows: Dennis Steven Weaver, Suzanne M. McDonnell, McDonnell & Weaver, 4091 - 24th Street, San Francisco, California 94114-3789; Duane B. Beeson, Beeson, Tayer & Silbert and Rosenthal & Leff, Inc., 100 Bush Street, Suite 1500, San Francisco, CA 94104-3982; Michael J. Stecher, Michael S. Rubin, Silver, Rosen, Fischer & Stecher, P.C., 100 Bush Street, Suite 410, San Francisco, CA 94104.

I further certify that all parties required to be served have been served.

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